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In the Supreme Court
OF THE
United States

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CHARLES ELMORE CROPLEY

OCTOBER TERM, 1952

No. 313

CECIL LEE DAVIDSON, also known as Jack Reynolds,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Cecil Lee Davidson, also known as Jack Reynolds, respectfully prays for a writ of certiorari to the United States Court of Appeals for the Ninth

Circuit to review the final judgment affirming the judgment of the United States District Court for the Northern District of California, Southern Division.

OPINIONS BELOW.

No opinion was rendered by the District Court. The opinion of the Court of Appeals is contained in the record. R. 1518-1525. It is not yet reported.

JURISDICTION.

The judgment of the Court of Appeals was entered July 2, 1952. R. 1526. A petition for rehearing, filed July 31, 1952, was denied August 4, 1952. R. 1527. The jurisdiction of this Court is invoked under the Act of June 25, 1948, 28 U.S.C., sec. 1254 (1).

SUMMARY STATEMENT.

The record is voluminous and consists of 12 typewritten volumes. Volume 1 contains the clerk's transcript (CT.), pages 1 to 178. Volumes 2-11 contain the reporter's transcript (R.), pages 1 to 1512. Volume 3 contains the proceedings in the Court of Appeals (R.), pages 1513 to 1528. A motion to dispense with printing the record is filed with this petition.

Petitioner was indicted along with defendants Edward J. Carrigan, Ray Calmes, and Sam Neider for the

crime of conspiracy to defraud the United States, as defined in 18 U.S.C., sec. 371. CT. 1-3. The indictment was in one count and alleged a single continuing conspiracy beginning January 27, 1951, and ending April 12, 1951. CT. 1-3. It also named Phil Davis and John Church as conspirators but not as defendants. CT. 1-3. The overt act ascribed to petitioner was that Davis had a conversation with him on or about February 10, 1951. CT. 3.

Defendant Carrigan was the United States Marshal at San Francisco, California. R. 707. The President appointed him to that office on August 11, 1950. R. 797. He had no earlier connection therewith. R. 797. Defendant Calmes was deputy United States Marshal with civil service status when defendant Carrigan took office. R. 455-456. Calmes lived in Oakland, Alameda County, California, and was assigned to the work in that territory. R. 971. Defendant Neider was an operator in real estate and investments, and lived in San Francisco. R. 1042-1043. Neider had been a friend and confidant of Davis for about 25 years. R. 234, 342. Davis owned an automobile agency in Oakland, and resided with his family in Alameda County. R. 227-228. Church was employed by Davis as manager of the automobile agency. R. 19. Petitioner was business manager or agent of the Alameda County Building Trades Council whereof all construction unions were members. R. 1197-1199. He worked and lived in Alameda County. R. 1194. He was the lessee on a percentage basis of premises owned by Neider. R. 1043-1044.

In January of 1951 Davis was a potential federal prisoner. He had been convicted of violating the Motor Boat Act of 1940. 46 U.S.C., sec. 526. On November 7, 1949, the United States District Court, at Sacramento, California, had sentenced him to imprisonment for six months. R. 17-18. The judgment of conviction had been affirmed by the United States Court of Appeals for the Ninth Circuit on December 11, 1950. *Davis v. United States,* 185 F. 2d 938. His petition to this court for a writ of certiorari, pending in January of 1951, was denied on February 26, 1951. *Davis v. United States,* 340 U.S. 932.

The offense of which Davis was convicted was a misdemeanor. 46 U.S.C., sec. 526m. It was not punishable by imprisonment in a penitentiary. 18 U.S.C., sec. 4083. Normally, Davis would have been imprisoned at the McNeil Island prison camp in the state of Washington. R. 461-462, 733. In such cases, however, the Director of Prisons, Washington, D.C., has discretion to authorize or approve imprisonment in a local jail. R. 463-464, 476-477, 514, 717-718, 733. Requests for such authorization or approval are frequent and often informal. R. 731-733. On November 29, 1949, and responsive to an application by the attorney who represented Davis when he was tried and convicted the Director of Prisons authorized or approved the imprisonment of Davis in a local jail. R. 145, 446-447. That authorization or approval was never revoked. R. 456. Once Davis was imprisoned in a local jail he could not be transferred to the McNeil Island prison camp without specific authorization from the

Director of Prisons. R. 515. In the ordinary course of events, if Davis surrendered at Sacramento, where he was convicted, he would be imprisoned in the Solano County jail at Fairfield, California (R. 464); if he surrendered at San Francisco, he would be imprisoned in the San Francisco county jail at San Bruno, California (R. 464); and if he surrendered in Alameda County, where he lived and had his place of business, he would be imprisoned in the Alameda County jail at the Santa Rita prison farm (R. 660). The Alameda County jail was an approved local jail for federal misdemeanor prisoners. R. 464, 716, 950-951.

Defendant Calmes was the deputy United States Marshal who arrested Davis in 1949 on the misdemeanor charge of violating the Motor Boat Act of 1940. R. 228. In 1950 Calmes bought an automobile from the Davis automobile agency. R. 20, 229. Before January 27, 1951, Calmes had discussed with both Davis and Davis' employee Church the possible imprisonment facing Davis. R. 22, 277. On January 27, 1951, defendant Calmes brought defendant Carrigan into the Davis automobile agency as a prospective purchaser of an automobile. R. 24. Davis was absent from the agency at the time and Church testified as to what occurred. A fair inference from Church's testimony is that defendant Carrigan unsuccessfully sought to use the veiled threat of his position and influence as United States Marshal to extract from Davis a new automobile worth $3000 in exchange for an old automobile worth half that amount. R. 24-27. *That testi-*

mony was confined to the case against defendants Carsigan and Calmes and is not evidence against petitioner. R. 24.

The occurrences of January 27, 1951, were narrated by Church to Davis. Davis became apprehensive and immediately consulted his attorneys. R. 363. Davis stated they advised him that the Director of Prisons had authorized and approved imprisonment in a local jail. R. 265-269. These were attorneys who had been substituted by Davis around December of 1949 for the attorney previously representing him. Their employment came about through a recommendation made by petitioner to Neider. R. 344-347. Davis had expressed to Neider dissatisfaction with the attorney representing him. Neider, in turn, had consulted petitioner about attorneys and petitioner made the recommendation. R. 1047-1052, 1211-1213.

Apprehension over the episode of January 27, 1951, also caused Davis to again consult his friend and confidant Neider. Davis testified he told Neider about the episode of January 27, 1951, that Neider said he could get assistance about jailing, and for Davis to see petitioner. R. 236-237, 390-391, 396-397. *That, however, is not evidence against petitioner.* At the conclusion of the government's case the court granted a judgment of acquittal in favor of defendant Neider. CT. 12-13. At that time the court also made a ruling expunging as evidence all statements and declarations ascribed to Neider. R. 741-742.

The testimony in the record is that the episode of January 27, 1951, was not mentioned by Davis to

Neider, and that their conversation was confined to a general discussion as to how federal prisoners were jailed. R. 1060. There is no evidence in the record that Davis ever mentioned to Neider or petitioner that the Director of Prisons had authorized or approved local jailing for Davis. Neider consulted petitioner following this conversation. This was early in February of 1951 and the Davis petition for a writ of certiorari then pending in this Court was not denied until February 26, 1951. (*Davis v. United States,* 340 U.S. 932.)

As the record has it, Neider and petitioner discussed how federal prisoners were jailed and whether local jailing for Davis could be arranged. R. 1058-1060, 1222-1225. They had another conversation within a few days and reached the conclusion that the best plan would be to send a representative to Washington, necessitating a cost of $1000 to Davis, to there present to the Director of Prisons an application and showing for local jailing for Davis. R. 1060-1061, 1225-1231. Neider testified he relayed this conclusion to Davis and that the plan was acceptable to Davis. R. 1061-1063. The testimony of both Neider and petitioner was to the effect that they never discussed any other plan with Davis and were never parties to any other plan, arrangement, or "deal". R. 1154-1157, 1233-1234. Nowhere in the record is there any evidence that Neider or petitioner ever directly or indirectly communicated with defendant Carrigan or defendant Calmes respecting Davis or the Davis case. Obviously, the efforts of Neider and petitioner were to help, not

hurt, Davis, to work with him and for him, not against him. The testimony of Davis confirms this. R. 382-383, 434-435.

Between early in February of 1951 and March 16, 1951, there were meetings and conversations between Davis and petitioner. Fairly summarized, the testimony of Davis was that on or about February 10, 1951, petitioner said he was a good friend of Marshal Carrigan and that for $200 a month Davis would be placed in the Solano County jail (Fairfield) with special privileges and it would be a wise move for Davis as the Marshal could help or hurt him, and Davis said he would "go along" with the deal (R. 237-239); that later in February petitioner said the Marshal had changed the plans and Davis would be sent to Santa Rita instead of Fairfield (R. 240-242); that on March 5, 1951, petitioner told Davis when and where to surrender (R. 242-243); and that on March 16, 1951, petitioner told Davis at Santa Rita that the Marshal was angry because he had received no money and Davis would be sent to the McNeil Island penitentiary the following Wednesday (March 21) if $500 was not paid immediately (R. 245-246).

When this court denied the Davis petition for writ of certiorari on February 26, 1951, the clerk immediately sent telegraphic notice of such action to the attorneys representing Davis. R. 1112-1113. They communicated with the clerk of the Court of Appeals and were informed by him respecting mandate of this court, mandate of the Court of Appeals, and order of the District Court to take Davis into custody. R.

1114. Before March 5, 1951, they notified Davis of the action of this Court and of his impending surrender. R. 1114. First by telephone and then in person they communicated with the office of the United States Marshal at San Francisco and discussed the time and place of surrender by Davis and place of imprisonment. R. 1114-1115. On March 5, 1951, they arranged with the Marshal's office for the time and place of such surrender in Alameda County. R. 1103-1107. Davis surrendered to Deputy Marshal Calmes in Alameda County on March 7, 1951, at the time and place thus arranged by the attorneys for Davis, and Calmes delivered him to the Santa Rita prison farm in Alameda County. R. 819-821, 970-972.

While at the Santa Rita prison farm Davis was visited by his attorneys. R. 273. He was also visited by Neider. A visit by Neider occurred on March 18, 1951, at which time Davis told Neider he had been informed he was about to be moved from Santa Rita and Davis asked Neider to see if the "deal" for a representative going to Washington to interview the Director of Prisons could be handled on the basis of $500 down and $500 contingent, and Neider promised to do what he could. R. 1079-1080. Petitioner was absent from Oakland from March 16, 1951, to March 19, 1951, and on his return he found an envelope at his place of business containing $500. R. 1255. He communicated with Neider and was advised as to the contingency basis proposed by Davis, and petitioner replied that such basis was impossible. R. 1256-1257, 1181-2. Neider suggested a meeting with Church. R.

1183. They had not met previously. R. 43. Church and petitioner had two meetings and Neider was present at the first, one occurring on March 24, 1951, and the other on March 26, 1951. Fairly summarized, the testimony of Church was that on March 24, 1951, petitioner said that Marshal Carrigan wanted another $500 and petitioner had "enough on the guy" so there would be no further demands, and when Neider asked petitioner to try and make a deal, petitioner offered to return the $500 to Church and Church said he had no authority to receive it (R. 42, 47-48, 193-194), and that on March 26, 1951, Church asked petitioner for the $500 and petitioner handed it to him, and Church then said to petitioner that Davis had told Church to tell petitioner (1) to get the $500 back, (2) if any attempt was made to move Davis the proper authorities would be (or had been) informed, and (3) a wire would be sent to the Director of Prisons, and petitioner then said, "The orders for Mr. Davis' removal were issued yesterday", or "The papers were already made out yesterday" (R. 50-51, 203-209). There was a brief conversation over the telephone between Church and petitioner on March 27 or 28, 1951, in which, according to Church, petitioner again repeated he was "all through". R. 56. There is no evidence in the record that after March 26, 1951, petitioner had any contact with the Davis case or any phase thereof.

Turning to the movements of defendants Carrigan and Calmes the record shows that defendant Carrigan left San Francisco for the east at 8:40 a.m. of March

19, 1951, and did not return until after Wednesday, March 21, 1951. R. 495-496. The record also shows that defendant Calmes left for Honolulu on March 24, 1951, and did not return to San Francisco until April 4, 1951. R. 973. There was no attempt to move Davis from Santa Rita until after March 26, 1951, and until after Church had told petitioner that the FBI had been or would be called in in the Davis case.

After leaving petitioner's office on March 26, 1951, Church first consulted an attorney. Then the District Attorney of Alameda County, the Sheriff of Alameda County, and the FBI were called in. R. 170. From then on, all actions of Davis and Church were directed and supervised by the FBI. From then on, the record is concerned with the action of defendants Carrigan and Calmes under the surveillance of the FBI. The culmination was on April 12, 1951, when Church handed defendant Carrigan the sum of $2000 near 7th and Mission Streets in San Francisco and the FBI apprehended defendant Carrigan with the $2000 in his possession.

Petitioner was convicted of the single continuing conspiracy alleged in the indictment as beginning on January 27, 1951, and ending on April 12, 1951. CT. 151. By judgment and commitment he was sentenced to imprisonment for three years and to payment of a fine of $3000. CT. 168-169. That judgment was affirmed by the Court of Appeals. R. 1518-1525.

QUESTIONS PRESENTED.

1. Is the present decision uniform with the decisions in other circuits applying the rule that in conspiracy cases the corpus delicti cannot be proved by admissions or declarations of a defendant, unless corroborated by independent evidence?

2. Is the present decision uniform with the decisions of this Court and in other circuits applying the rule that if one abandons a conspiracy or withdraws from it he is absolved from liability for what comes after?

3. Was petitioner prejudiced by conviction of a general conspiracy on evidence proving several conspiracies?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. THE PRESENT DECISION IS NOT UNIFORM WITH THE DECISIONS IN OTHER CIRCUITS APPLYING THE RULE THAT IN CONSPIRACY CASES THE CORPUS DELICTI CANNOT BE PROVED BY ADMISSIONS OR DECLARATIONS OF A DEFENDANT, UNLESS CORROBORATED BY INDEPENDENT EVIDENCE.

The rule above stated is one of uniform application in other circuits. (*United States v. Di Orio,* 3 Cir. 150 F. 2d 938, 940; *Tabor v. United States,* 4 Cir. 152 F.2d 254, 257; *Colt v. United States,* 5 Cir. 160 F. 2d 650, 651; *Ryan v. United States,* 8 Cir. 99 F. 2d 864, 869; *Tingle v. United States,* 8 Cir. 38 F. 2d 573, 575.)

The Court of Appeals for the Ninth Circuit did not apply that rule in affirming the judgment against petitioner.

The indictment charged petitioner with being party to a single and general conspiracy that began on January 27, 1951, and continued until April 12, 1951. The Court of Appeals recognized that a conspiracy was formed by defendant Carrigan, United States Marshal, and defendant Calmes, his deputy, with the objective of extracting money or property from Davis, a potential federal prisoner, through promises or threats. The Court of Appeals also recognized that the first manifestation of the conspiracy was the episode of the proposed automobile trade at the Davis automobile agency on January 27, 1951. And the Court of Appeals further recognized that the record was devoid of evidence that petitioner was party to any conspiracy at that time.

Proof legally sufficient in character and weight was therefore necessary to establish that somewhere along the line after January 27, 1951, petitioner knowingly joined the conspiracy with full knowledge of its purpose and accepted it and its implications. (*United States v. Andolschek,* 2 Cir. 142 F. 2d 503, 507.) Under the rule above invoked, admissions and declarations ascribed to petitioner by Davis or Church were not enough to prove the corpus delicti. Independent evidence corroborated thereof was essential, and there was none. On the contrary, the independent evidence refuted and disproved the admissions and declarations ascribed to petitioner.

The opinion of the Court of Appeal intimates that petitioner was brought into the Davis case following the episode of January 27, 1951, because he was a close friend of Carrigan. This intimation is based entirely on statements by Davis that petitioner said he was a close friend of Carrigan. The independent evidence does not corroborate such statements. The independent evidence shows that petitioner was first brought into the Davis case when Neider asked petitioner as a friend and business associate to recommend attorneys for Davis long before Carrigan became marshal. The independent evidence shows that after January 27, 1951, petitioner was again brought into the Davis case by Neider, a close friend of Davis, and still a friend and business associate of petitioner. Petitioner was brought in as an ally of Davis and Neider, not as an emissary from Carrigan. And the independent evidence shows that Carrigan and petitioner were not at all friendly. Petitioner opposed Carrigan in his candidacy for the office of United States Marshal and supported a rival candidate. R. 882.

The statements ascribed to petitioner by Davis or Church regarding "deals" with Carrigan are not corroborated by independent evidence. On the contrary, the independent evidence refutes and disproves the statements. Neider brought petitioner again into the Davis case after January 27, 1951, and the testimony of each showed that the plan they worked out respecting local jailing for Davis involved no "deal" with Carrigan or Calmes. The undisputed independent

evidence shows that Neider communicated that plan to Davis and that Davis accepted it before any meeting occurred between Davis and petitioner. Any contrary statements by Davis as to what Neider told him were expunged as evidence by the ruling of the court accompanying the judgment of acquittal for defendant Neider.

The opinion of the Court of Appeals also intimates that petitioner arranged, presumably with Carrigan, for the surrender of Davis on March 7, 1951. Again the intimation is based entirely on statements by Davis as to what petitioner said. The independent evidence definitely shows that all arrangements for the surrender of Davis were made by the attorneys for Davis. R. 1105, 1112-1115.

There is no case against petitioner if the rule above invoked be applied. Petitioner therefore respectfully urges that his petition should be granted and the decision herein made uniform with the rule approved in the cases above cited.

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2. THE PRESENT DECISION IS NOT UNIFORM WITH THE DECISIONS OF THIS COURT AND IN OTHER CIRCUITS APPLYING THE RULE THAT IF ONE ABANDONS A CONSPIRACY OR WITHDRAWS FROM IT HE IS ABSOLVED FROM LIABILITY FOR WHAT COMES AFTER.

The rule above stated is firmly established. (*Hyde v. United States,* 225 U.S. 347, 369; *Local 167 v. United States,* 291 U.S. 293, 297-298; *United States v. Graham,* 2 Cir. 102 F. 2d 436, 444; *United States v. Anderson,* 7 Cir. 101 F. 2d 325, 331.) It has here-

tofore been recognized as the law in the Ninth Circuit. (*Marino v. United States,* 9 Cir. 91 F. 2d 691, 696.)

The record makes it obvious that the conspiracy ended as to Davis on March 26, 1951. On that date the FBI took over, and all acts and conduct of Davis and Church were thereafter directed, supervised, and manipulated by the FBI. From then on, Davis ceased to be the victim of a conspiracy and became the bait to entrap defendants Carrigan and Calmes. And the record makes it equally obvious that petitioner was an ally of Davis and Neider rather than an ally of Carrigan and Calmes. So far as petitioner was concerned the conspiracy, if any, also came to an end on March 26, 1951. Under the rule above invoked he was therefore absolved from liability for what came after March 26, 1951. After that date, all the negotiations back and forth occurred which ultimately resulted in defendant Carrigan accepting $2000 from Church with the FBI looking on. Nowhere in its opinion, however, does the Court of Appeals consider the fact that at all events petitioner was absolved from liability for what came after March 26, 1951. Nowhere in its opinion does the Court of Appeals consider the legal consequences flowing from the fact that petitioner was thus absolved. Nowhere in its opinion does the Court of Appeals consider and apply the rule above invoked.

Along with defendants Carrigan and Calmes, the jury found petitioner guilty of a conspiracy that began on January 27, 1951, and ended on April 12, 1951. That the acts and conduct of Carrigan and Calmes

after March 26, 1951, influenced the jury in finding petitioner guilty of the general and continuing conspiracy, cannot be doubted. Nor can it be doubted that the acts and conduct of defendants Carrigan and Calmes after March 26, 1951, influenced the trial judge in imposing sentence and fine upon petitioner.

Petitioner therefore respectfully urges that his petition should be granted and a decision rendered in accordance with the rule above invoked and the cases applying it.

---

3. PETITIONER WAS PREJUDICED BY CONVICTION OF A GENERAL CONSPIRACY ON EVIDENCE PROVING SEVERAL CONSPIRACIES AT MOST.

Petitioner invokes the rules declared and applied in *Kotteakos v. United States,* 328 U.S. 750, and *Canella v. United States,* 9 Cir. 157 F. 2d 470.

As earlier shown in this petition, there was no substantial evidence connecting petitioner with any conspiracy to which defendants Carrigan and Calmes were parties on or before March 26, 1951. And there was no substantial evidence connecting petitioner with any conspiracy to which defendants Carrigan and Calmes were parties after March 26, 1951. On the record, if petitioner was guilty of conspiracy at all, and he denies it, it was not the conspiracy charged in the indictment or the conspiracy for which defendants Carrigan and Calmes were found guilty. If petitioner was party to a conspiracy it began and ended with the arrangement between Neider and petitioner to assist Davis by sending a representative to Wash-

ington to obtain authorization and approval of the Director of Prisons for local jailing for Davis. If that arrangement was a conspiracy, and the trial court in exonerating Neider impliedly held that it was not, it was certainly not the conspiracy alleged in the indictment. If petitioner was convicted of the general conspiracy on evidence proving several conspiracies or a separate conspiracy, the cases above cited are plain holdings to the effect that he was prejudiced by such conviction.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the Ninth Circuit and that the judgment of said court in said cause be reviewed and reversed as to petitioner.

Dated, San Francisco, California,
August 25, 1952.

CLIFTON HILDEBRAND,
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LESLIE C. GILLEN,
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CECIL LEE DAVIDSON, ALSO KNOWN AS JACK REYNOLDS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Tr. 1518-1525) [1] is reported at 197 F. 2d 817.

JURISDICTION

The judgment of the Court of Appeals was entered on July 2, 1952 (Tr. 1526), and a petition

[1] The symbol "R." refers to volume I of the typewritten record on appeal, while the symbol "Tr." refers to volumes II-XII.

for rehearing was denied on August 4, 1952 (Tr. 1527). The petition for a writ of certiorari was filed on August 30, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether the evidence establishes petitioner's participation in the conspiracy charged in the indictment.

STATUTES INVOLVED

18 U.S.C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. 4082 provides in pertinent part as follows:

> Persons convicted of an offense against the United States shall be committed, for such terms of imprisonment as the court may direct, to the custody of the Attorney General of the United States or his authorized representative, who shall designate the places of

confinement where the sentences shall be served.

The Attorney General may designate any available, suitable, and appropriate institutions, whether maintained by the Federal Government or otherwise, or whether within or without the judicial district in which the person was convicted.

The Attorney General may order any inmate transferred from one institution to another.

STATEMENT

On April 18, 1951, a one-count indictment (R. 1-3) was filed in the United States District Court for the Northern District of California, against petitioner and three others, Edward J. Carrigan, Ray Calmes and Sam Neider, charging that continuously between January 27 and April 12, 1951, they had conspired together and with two others, Phil Davis and John Church,[2] to defraud the United States in the exercise of its governmental powers by interfering with the Department of Justice in its function of designating a place of imprisonment for Davis, who had been convicted of a federal offense.

Petitioner and his co-defendants were tried together before a jury, and they were all, with the exception of Neider,[3] found guilty (R. 151). Peti-

[2] Davis and Church, though named as co-conspirators in the indictment, were not charged with any offense.

[3] Motion for judgment of acquittal (Tr. 739) was granted as to Neider at the end of the Government's case (Tr. 741; R. 12-13). Similar motions on behalf of petitioner and the others (Tr. 735-739) were denied (Tr. 741-742).

tioner was sentenced to three years' imprisonment and a $3,000 fine (R. 164); Carrigan to five years' imprisonment and a $5,000 fine (*id.*); and Calmes to two years' imprisonment and a $1,000 fine (R. 165). On appeal, the judgments of conviction were affirmed (Tr. 1526).[4]

The evidence adduced by the Government may be summarized as follows:

On November 7, 1949, Phil Davis, an automobile dealer in Oakland, California, was sentenced in the United States District Court for the Northern District of California, Northern Division, to six months' imprisonment for having recklessly operated a motor boat on Lake Tahoe, in violation of 46 U.S.C. 526(l) (Tr. 17-18, 228; Gov. Ex. 1; Tr. 17; *Davis* v. *United States,* 185 F. 2d 938 (C. A. 9), certiorari denied, 340 U. S. 932).

On November 29, 1949, the Director of the Bureau of Prisons, Department of Justice, Washington, D. C., advised John Roseen, then acting as United States Marshal at San Francisco, that, because of a pending civil case against Davis resulting from the Lake Tahoe offense, the bureau had "no objection," provided the marshal and the United States Attorney agreed, to having Davis serve his sentence in a local jail as requested by his trial counsel (Tr. 147, 444-446, 448, 701-702, 705-706; Gov. Exs. 14, 22-A, 22-B; Tr. 447, 700). No action was taken thereon at that time, because Davis was out on bail pending an appeal from his con-

[4] Carrigan and Calmes have not sought review of the judgment of the court below.

viction (Tr. 446, 448). On August 11, 1950, while Davis was still on bail, Carrigan was appointed United States Marshal for the Northern District of California, succeeding Roseen, who reverted to his former status of chief deputy marshal (Tr. 147-148, 444, 448).

Shortly prior to January 27, 1951, Calmes, a deputy marshal in Carrigan's office,[5] visited the Davis agency on several occasions for the purpose of arranging a meeting between Davis and Carrigan, who was interested in purchasing a new automobile (Tr. 19, 20-22). On one such occasion, Calmes suggested that Davis make a "deal" with Carrigan for a new Chrysler, stating that Carrigan was "all powerful" and "would be a fine connection" for Davis in view of his prospective incarceration (Tr. 229-230, 231, 263). Calmes told Davis that Carrigan could arrange for him to serve his sentence at Fairfield (the Solano County jail), where he would be able to enjoy unusual privileges since Carrigan knew its warden (Tr. 232, 302-303, 307-308, 464). In reply to Davis' statement, that his attorney had already obtained approval from Bennett, the Director of Prisons, for his confinement at San Bruno (the San Francisco County jail), Calmes stated that, "regardless of Mr. Bennett, Mr. Car-

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[5] Calmes was acqainted with Davis and Church, his general manager, having met them about two years previously at a marshal's automobile auction (Tr. 19, 229, 260). In 1949, Calmes had taken Davis into custody on charges arising from the Lake Tahoe accident (Tr. 229, 261-262). Subsequently, he purchased from Davis a new Chrysler, which he later customarily brought to Davis' place for servicing (Tr. 20, 29, 229, 261).

rigan will have sole charge of you and full power over you once you are remanded to his custody," adding that Carrigan could do him "as much harm" as "good" (Tr. 231-232, 263-264, 309, 464). Calmes also told him that there were some "very bad places" to which he could be sent, mentioning, specifically, San Francisco jail, Leavenworth and McNeil Island (Tr. 308).

On January 27, 1951, Calmes and Carrigan met with Church, general manager of the Davis agency (Tr. 23-24, 233-234, 258-260). When Church offered a $1,150 "trade-in" allowance on Carrigan's 1947 Pontiac, Carrigan replied, "No, you will never make a deal that way" (Tr. 24-25). He followed by asking, "Well, does Mr. Davis expect to make a profit in this deal?" (Tr. 26.) After selecting a new Chrysler, having a list price of $3,025, Carrigan stated to Church, "I guess Mr. Davis understands that after he is arrested I will have full charge over his custody," adding, "I think Phil Davis ought to make me a straight across-the-board deal, trade car for car. After all, $1,500 or $2,000 doesn't mean anything to Mr. Davis" (Tr. 26-27). After Carrigan had left, Calmes advised Church, "I think it will be worth Phil Davis' while to make that deal with Carrigan" (Tr. 27). Upon learning of Carrigan's proposition, Davis became fearful that he would experience physical mistreatment if he did not accede to the proposition (Tr. 28, 280, 305-306).

Several days later, Davis met petitioner, who, posing as "a very close friend" of Carrigan, offered

Davis a "deal," which he said was possible through Carrigan's intercession (Tr. 237-238, 406-408, 418). Davis agreed to pay $200 per month in consideration of his imprisonment at Fairfield, where he would be allowed a telephone, unlimited visits, and the privilege of doing his own cooking (Tr. 238-239, 418). Petitioner told Davis that he was "making a wise move because where the marshal could help" him, "he could also hurt" him "just as much" (Tr. 239). Davis again met petitioner, a few days later, to reaffirm the agreement (Tr. 240).

About mid-February 1951, although this Court had not yet ruled on Davis' pending petition for certiorari to review the affirmance of his conviction, petitioner told him that he had news from Washington that the petition would be denied and that he would have to commence service of his sentence in a few days (Tr. 240-241, 419, 105). Petitioner also told him that Carrigan had decided that Davis should serve his sentence at Santa Rita Rehabilitation Center, a prison-farm branch of the Alameda County jail at Oakland, rather than Fairfield (Tr. 241, 512). He assured Davis that "Carrigan had very good connection" there, and that petitioner could also help him since he was a personal friend of the sheriff in charge of that institution (Tr. 242, 389-390.)[6] At that meeting, peti-

[6] The sheriff testified that, about two weeks prior to March 7, 1951, petitioner had called him, stating that he thought Davis would be taken to Santa Rita and had tried to arrange for special privileges for Davis, such as a telephone and unrestricted visits from Davis' business manager (Tr. 653, 654-655, 661-662). Davis had never asked petitioner to speak to the sheriff on his behalf (Tr. 278).

tioner also told Davis that he would notify him concerning the details and the date for his surrender to the marshal (*id.*).

Davis' petition for a writ of certiorari was denied on February 26, 1951 (Tr. 105; 340 U. S. 932). On March 5, 1951, petitioner apprised Davis, who was incommunicado, that he would be required to surrender two days later. Davis told petitioner that he would surrender at 2:00 p.m. on March 7, at a certain street intersection (Tr. 242-243). Petitioner was taken into custody by Calmes at the appointed time and place and delivered directly to Santa Rita (Tr. 30, 243-245). He was allowed to surrender on a street corner in order to avoid publicity (Tr. 485).[7]

On March 11, 1951, when Church first visited Davis at Santa Rita, Davis instructed him to cancel Davis' agreement with petitioner because he was not receiving any "special benefits" as had been promised (Tr. 321-323).

On March 16, 1951, petitioner visited Davis at Santa Rita and told him that "Carrigan was very angry because he had received no money," and that Davis would be on the "train leaving for McNeil Island Penitentiary the following Wednesday," if

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[7] Santa Rita, prior to Davis' commitment there, never had any male prisoners, although it was not necessarily restricted to female inmates (Tr. 457, 660). Roseen testified that he understood that Davis was to be placed in the Alameda County jail (Tr. 458, 494). He did not know that Davis had been taken to Santa Rita until a sheriff from that institution had called him to inquire why Davis had not been processed through the main branch (Tr. 458, 483, 494-495). It seems that Davis was taken directly to Santa Rita to avoid publicity (Tr. 330).

Carrigan was not paid $500 "immediately" (Tr. 245-246; Gov. Ex. 2; Tr. 34-35, 99-100). A few days later, on instructions from Davis, Church forwarded $500 in cash to petitioner (Tr. 39-40, 50-52, 246-247; Gov. Exs. 3-A, 3-B; Tr. 52). However, on March 26, 1951, petitioner returned the money, upon Church's request, after Davis had declined to accede to petitioner's demands for the payment of an additional sum of $500 (Tr. 46-50, 52, 189). At the same time, Church threatened petitioner that, if any attempt was made to move Davis from Santa Rita, he would notify "the proper authorities" of the facts surrounding Davis' incarceration (Tr. 50-51, 196-201, 205-207).[8] In reply, petitioner told him that orders for Davis' transfer had already been issued the day before (Tr. 51). On March 27, 1951, Church, in a telephone conversation, told petitioner that Davis felt he was being "badly abused," to which petitioner replied that as far as he was concerned he was "through" with Davis (Tr. 56).

On March 30, 1951, a deputy marshal, on Carrigan's orders, instructed the sheriff's office at Santa Rita to have Davis prepared for transfer to McNeil Island within three days (Tr. 516-519, 526, 529-531, 538). Carrigan told the deputy to have the sheriff inform "Davis that if he has any business to transact he had better do it soon" (Tr. 530). Accordingly, that day, the sheriff alerted Davis

[8] Later that day, Davis and Church gave statements to the F. B. I. concerning the demands for money made upon Davis (Tr. 92, 170, 197, 250, 251, 253, 286; Gov. Exs. 7-11; Tr. 122, 443, 444).

for transfer (Tr. 656, 658). Actually, no orders had been issued for Davis' transfer to McNeil Island (Tr. 210, 469). Although the marshal had discretionary power to transfer Davis, for reasons of his welfare, from Santa Rita to another local jail, he had no such power, without special authorization from the Director of the Bureau of Prisons, to transfer him to McNeil Island Prison Camp under any circumstances (Tr. 480-481, 515).

On April 10, 1951, Calmes appeared at Santa Rita armed with a mandate for Davis' removal to Fairfield (Tr. 247, 475, 540, 543-544; Gov. Exs. 17-20; Tr. 471, 543-545). He told Davis that Carrigan desired some of the bribe money which it had been rumored Davis was paying, or, in lieu thereof, a new car in exchange for his used car, and that, in addition, Carrigan wanted Calmes to be paid $500 (Tr. 248-249, 325, 334, 336-337). Calmes also told Davis that he had dissuaded Carrigan from ordering Davis' removal to McNeil Island Penitentiary and obtained the transfer to Fairfield (Tr. 249, 233). Davis remonstrated with Calmes about his removal and promised to pay the money previously requested by petitioner if he were permitted to remain at Santa Rita unmolested (Tr. 249, 338-339). Calmes stated that he had to check the matter with Carrigan (Tr. 249-250, 338-339). Having done so, he left without executing the transfer orders (Tr. 65, 249-250, 546, 338-339, 438-442, 475; Gov. Exs. 12-13; Tr. 439, 442).

On April 11, 1951, Calmes reported to Church that Davis would pay the marshal's office $2,000 (Tr.

65-66). On April 12, 1951, pursuant to instructions from the F.B.I. Church reported to Calmes that Davis had authorized the payment of that amount, on condition that the money be delivered by Church to Carrigan personally (Tr. 67, 73-74). Later that day, Carrigan called and arranged with Church to personally receive payment from Church (Tr. 68). On that day, Carrigan was arrested by agents of the F.B.I., after Church had handed him $2,000, at the appointed time and place outside the Federal Building in San Francisco (Tr. 71-73, 555-557, 559, 562, 581-583, 595-598, 615-619; Gov. Exs. 6, 6-A, 21; Tr. 563, 562, 564-565, 614).

In submitting the case to the jury, the judge charged:

> In considering the charge of conspiracy contained in the indictment I instruct you that the defendants are not on trial for doing any of the overt acts alleged in the indictment. They are only on trial for unlawfully conspiring together. Unless you find a moral certainty and beyond a reasonable doubt that the defendants did so conspire together, as charged in the indictment, you must return a verdict finding the defendants not guilty even though you should also find that one or more of the defendants did one or more of the overt acts set forth in the indictment. [Tr. 1488.]
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> * * * * *
>
> An indictment charging a specified crime cannot be supported or proved by proof of a different crime. If you find that two or more

> of the defendants entered into some conspiracy somewhere at some time but that they did not enter into the conspiracy charged in the indictment then you must acquit them of the conspiracy charged in the indictment. [Tr. 1490.]

ARGUMENT

Petitioner contends that there was no substantial evidence connecting him with the conspiracy charged in the indictment to which Carrigan and Calmes were parties (Pet. 17-19) and that his conviction improperly rests merely on declarations by the co-conspirators Davis and Church uncorroborated by independent evidence (Pet. 12-15). The record refutes these contentions.

As the court below held, the evidence clearly established that continuously from January 27, 1951, when they unsuccessfully tried to get a new Chrysler for Carrigan's old car, until April 12, 1951, the day of Carrigan's arrest, Carrigan and Calmes conspired to solicit payments from Davis for the purpose of defrauding the United States in the exercise of its governmental powers. Petitioner seems to argue that because the evidence directly relating to him covered a period which commenced after January 27 and ended before April 12, he could not properly be convicted of the conspiracy charged in the indictment. Once a conspiracy has been formed, however, the addition of a new member does not change the status of the original conspirators or create a new conspiracy. The new member not only becomes responsible for all succeeding acts of the conspiracy, but adopts all of the

preceding acts which the original conspirators performed in furtherance thereof. *Marino* v. *United States,* 91 F. 2d 691 (C.A. 9), certiorari denied, 302 U.S. 764; *United States* v. *Spadafora,* 181 F. 2d 957 (C.A. 7); *Norton* v. *United States,* 295 Fed. 136 (C.A. 5); *Bryant* v. *United States,* 257 Fed. 378 (C.A. 5).

There was ample evidence from which the jury could properly conclude that petitioner, shortly after January 27, 1951, entered into the existing conspiracy between Carrigan and Calmes to solicit payments from Davis. The evidence shows that petitioner, posing as "a very close friend" of Carrigan, offered to obtain, through Carrigan, some prison privileges for Davis for $200 a month. It further shows that petitioner complimented Davis on his "wise move" in acceding to his proposition, observing that the marshal could hurt him as much as he could help. Thereafter, petitioner informed Davis in advance that Santa Rita was to be his place of confinement. He arranged the details as to time and place for Davis' surrender at a time when Davis was incommunicado and had no official information concerning his surrender from any other source. Within ten days following Davis' imprisonment, petitioner visited him at Santa Rita to tell him that "Carrigan was very angry because he had received no money," and that he would be transferred to McNeil Island Penitentiary, if Carrigan was not paid $500 "immediately." The same threat of transfer to McNeil Island was, a few days later, made by Carrigan, through directions to the

sheriff of Santa Rita, although Carrigan had no authority to order such transfer. Manifestly, the jury was justified in assuming that petitioner's familiarity with the activities of Carrigan's office was the result of a close liaison. As the court below said (Tr. 1523), "the inference of pre-arrangement and tie-in between Davidson and Carrigan and Calmes was inescapable."

There was thus an abundance of evidence directly relating to petitioner to warrant the conclusion that he had joined and actively participated in the conspiracy originally hatched between Carrigan and Calmes to get money from Davis. Proof of his participation in the conspiracy rests, not upon admissions and declarations, as he contends (Pet. 12-15), but upon direct evidence concerning his own acts. Evidence of his meetings and conversations with Church and Davis tended directly to prove his particular dealings and relations with them. His conversations with them were not in the nature of confessions or narratives of past events; they were overt acts in furtherance of the conspiracy. The rule is that participation in a conspiracy may not be proved by the declarations of a co-conspirator. Thus, a statement by A to C that B is a member of a conspiracy would not be enough to establish B's membership. But there is no rule of law which prohibits A's testimony on the witness stand as to what B actually did from being considered to establish B's participation.

Overt acts may be considered in determining whether a conspiracy existed. *United States* v.

Holt, 108 F. 2d 365, 368-369 (C.A. 7), certiorari denied, 309 U.S. 672; see also *American Tobacco Co.* v. *United States,* 328 U.S. 781, 789. Petitioner's statements to Davis and Church were acts from which the fact of such a conspiracy, and his participation therein, could be inferred. See *Glasser* v. *United States,* 315 U.S. 60, 80; *United States* v. *Holt, supra.* Indeed, "Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collocation of circumstances.'" *Glasser* v. *United States, supra.* Once a continuing conspiracy between Carrigan and Calmes had been established, slight evidence would have been sufficient to connect petitioner therewith. *Phelps* v. *United States,* 160 F. 2d 858, 867-868 (C.A. 8), certiorari denied, 334 U.S. 860; *Meyers* v. *United States,* 94 F. 2d 433, 434 (C.A. 6), certiorari denied, 304 U.S. 583. Here, the evidence, showing a pattern of action on the part of petitioner, completely dovetailing the pattern set in motion by Carrigan and Calmes, was more than sufficient to show concert of action.

Petitioner's contention that the independent evidence negates his participation in the conspiracy is in realty an attempt to have this Court credit his own testimony, which the jury, by its verdict, discredited. He claims (Pet. 17-18), as he had testified, that his relations with Church and Davis between February and March 26, 1951, referred to his agreement with Neider "to assist Davis by sending a representative to Washington to obtain

authorization and approval of the Director of Prisons for local jailing for Davis. It is difficult to perceive why Davis would consider paying someone $1,000 to intercede for authority for local imprisonment during March 1951, when his attorney had already obtained such authority in November 1949. The jury quite naturally rejected this version of events.

It is the function of the jury, and not of an appellate court, to draw inferences from the evidence. The verdict, if supported by evidence from which inferences may reasonably be drawn to establish guilt beyond a reasonable doubt, will not be disturbed merely because, by indulging in every possible inference in favor of a defendant, it is possible to devise an innocent explanation for his conduct. *Glasser* v. *United States,* 315 U.S. 60, 80; *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 254; *Gorin* v. *United States,* 312 U.S. 19, 32. Particularly, as this Court put it in *Nye & Nissen* v. *United States,* 336 U.S. 613, 617, an appellate court "could not reverse them if that theory taxed their credulity."

Petitioner's further contention (Pet. 15-17) that the evidence shows that the conspiracy in which he may have been implicated was terminated as to him in time to absolve him of any criminal liability, is without substance. It was a question of fact for the jury, submitted to them under proper instructions (Tr. 1492), to determine whether or not petitioner had affirmatively disassociated himself from the conspiracy on March 26, 1951. Moreover, in

view of his active participation in the conspiracy up to that time, the fact of such disassociation would not absolve him of criminal responsibility for his previous active participation therein.

CONCLUSION

The judgment below is correct, and no conflict of decisions is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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